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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-209

J. C. BENEFIELD,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA DISTRICT COURT OF APPEAL SECOND DISTRICT

Roger C. Spaeder
ROGER E. ZUCKERMAN
WILLIAM W. TAYLOR, III
RICHARD A. STANLEY
ZUCKERMAN, SPAEDER & TAYLOR
1800 M Street, N.W.
Suite 375 North
Washington, D.C. 20036

Counsel for Petitioner

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Petitioner J. C. Benefield respectfully prays that a writ of certiorari issue to review the judgment of the Florida District Court of Appeal, Second District, entered in this proceeding on September 21, 1977, petition for rehearing denied November 18, 1977.

DECISION BELOW

The judgment of the Florida District Court of Appeal, Second Circuit, entered September 21, 1977, affirming, by order, petitioner's conviction in the Circuit Court of Pinellas County appears in the appendix hereto. The order of the Florida Supreme Court, dated December 21, 1978, declining to issue a writ of certiorari to the

Florida District Court of Appeal, along with the order of the Florida Supreme Court denying rehearing, dated April 20, 1979, appear in the appendix hereto.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether petitioner was denied due process of law in his trial for attempted bribery of the administrative judge of the Circuit Court for Pinellas County, Florida, when the trial judge, the colleague and subordinate of the Government's key witness, declined to recuse himself.
2. Whether the trial court properly admitted warrantless tape recordings of telephone conversations between petitioner and the Government's key witness.
3. Whether petitioner was denied his right to due process of law by the trial court's refusal to excuse a juror who admitted prejudice against the petitioner.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution which provides in relevant part:

> . . . nor shall any State deprive any person of life, liberty or property without due process of law.

The Fourth Amendment to the United States Constitution which provides:

> The right of the people to be secure in their persons, houses, papers and affects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affiirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Introduction

By information filed May 6, 1976, the State's Attorney for Pinellas County, Florida, charged petitioner with two counts of attempted bribery of a judicial officer in violation of §§ 838.01 and 838.015, Florida Statutes. Count I charged that on or about July 17, 1975, petitioner offered $50,000 to Harry W. Fogle, Pinellas County Circuit Court Judge, to induce Judge Fogle to arrange the release of approximately three hundred thousand dollars seized by local authorities from one Marvin F. Flowers incident to Flowers' arrest for drug smuggling. Count II charged that on October 9, 1975, petitioner offered a second bribe to Judge Fogle, this time in the amount of $5,000, to cause the Judge to act favorably on a bond motion filed by one Harry Estelle Hoffman, a defendant in the same drug prosecution as Flowers. Petitioner entered pleas of not guilty to both counts. On July 11, 1976, a jury of six persons returned verdicts of guilty on both counts. The trial judge sentenced petitioner, on August 10, 1976, to a ten-year term of imprisonment, the statutory maximum. Petitioner appealed his conviction to the Florida District Court of Appeal, Second District. The Second District affirmed the conviction by an order dated September 21, 1977. It denied a petition for rehearing on November 18, 1977.

Petitioner then sought discretionary review in the Florida Supreme Court by writ of certiorari. The Supreme Court of Florida denied his petition on December 21, 1978, with two judges dissenting. A petition for

rehearing was denied on April 20, 1979. On that date, the Supreme Court of Florida agreed to stay the mandate for a period of thirty (30) days. The Supreme Court of Florida denied petitioner's application for enlargement of stay of mandate pending the filing of a petition for a writ of certiorari in this Court and its action thereon.

Petitioner J. C. Benefield is a licensed doctor of chiropractic who had, at the time of these events, retired from the practice and devoted himself to real estate investments. He was a well-known figure in the Tampa-Clearwater community, having been active in community, civil, and political affairs. In 1961, petitioner was tried and convicted for attempting to influence a liquor licensing authority. He was represented in that case by Harry W. Fogle, the same individual who was to be the key Government witness against him in this case. The Florida Supreme Court reversed petitioner's 1961 conviction.

Petitioner's arrest and arraignment in this matter received intense and elaborate public attention, both in the press and in other media. Newspapers carried detailed accounts of the charges. Readers were reminded in particular detail about his 1961 trial and reversal of his conviction. The drug smuggling case and the unsavory reputations of the persons charged therein were also explored in detail. Both Judge Fogle and members of the State's Attorney's Office were publicly quoted.

The State's Attorney exercised his discretion to file the informtion against petitioner in the Circuit Court for Pinellas County.[1] Judge Fogle was at that time a judge of that Court and superior to the other two judges, Hon.

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[1] Because many of the events, including the alleged bribery attempts, had occurred in nearby Clearwater, venue would have been proper in either Pinellas County or Hillsborough County.

B. K. Driver and Hon. John S. Andrews. Judge Fogle was Administrative Judge for the Court and exercised authority over the schedule and calendars of the other two.

The case was first assigned to Judge B. K. Driver. Petitioner's counsel filed numerous pre-trial motions, including a motion to change venue on the ground of prejudicial pre-trial publicity, a motion to suppress recordings of telephone conversations between petitioner and Judge Fogle, allegedly made with Judge Fogle's consent, and a motion to recuse Judge Driver, on the ground that before his appointment to the bench Judge Driver had prosecuted petitioner for the 1961 case. Judge Driver denied all of petitioner's pre-trial motions.

Petitioner's counsel sought relief by writ of mandamus from the Florida District Court of Appeal, Second District. That Court ordered Judge Driver removed from the case.

The case was subsequently assigned to Judge Andrews, the only remaining judge on the criminal bench of the Circuit, other than Judge Fogle. Judge Andrews denied a defense motion to recuse himself and, after *de novo* review, denied the motion to transfer the case because of pre-trial publicity and the motion to suppress tape recordings of telephone conversations between Judge Fogle and petitioner.

Petitioner had sought recusal of Judge Andrews and transfer to a venue outside Pinellas County in order that the trial judge and the jury would not be subject to the external forces which inevitably affected the fairness of petitioner's trial. Judge Andrews was one of only three judges on the local criminal bench, all of whom worked in close proximity; he was also subordinate to Judge Fogle in the latter's role as administrative judge. Judge Fogle, who would appear as the chief witness for

the State, was administrative judge for the Court, a position that gave him supervisory authority over calendaring and other matters affecting the two other judges. Judge Andrews was required, both during pre-trial evidentiary hearings and during the course of the trial to make rulings upon Judge Fogle's credibility and upon the extent to which the defense would be permitted to cross-examine him. In refusing to suppress evidence of the telephone conversations he was required to find Judge Fogle's version of events credible, and he did so.

Judge Andrews himself observed at the outset of the proceedings that the case would be reduced to a "swearing match" between petitioner and Judge Fogle. (Tr. Vol. XII, 2060.) In closing argument, counsel for the Government and for petitioner agreed that the key issue was one of credibility. (Tr. Vol. XI, 1798-1799, 1831.) Petitioner's defense was that Judge Fogle had initiated, in the summer of 1975, efforts to have petitioner act as an intermediary in a scheme to obtain release of the impounded funds and assistance to the defendant Hoffman. (Tr. Vol. X, 1621-1623.) Petitioner testified that he bent to the pressure exerted by Judge Fogle and gave apparent assent to the early stages of the scheme only in the hope that Judge Fogle would drop the matter, which petitioner regarded as absurd. (Tr. Vol. X, 1653.) Judge Andrews denied defense efforts to explore Judge Fogle's financial condition to establish a motive for Judge Fogle to initiate the contacts. (Tr. Vol. IV, 593-596.) As noted above, Judge Andrews was required to rule upon defense entreaties that it was being rushed to judgment without adequate opportunity to prepare. He insisted that the case be tried immediately and admonished counsel that he intended to work late into the evenings and on weekends if necessary. (Tr. Vol. V, 626.) The proceedings adjourned regularly after 6:00 p.m. and were also conducted on Saturday and Sunday.

The case was tried before a jury of six. Judge Andrews allowed each party six peremptory challenges, rejecting defense requests for additional challenges, which could have been granted "in the interest of justice" under Florida Rule 3.350(3). He summoned only twenty-two (22) veniremen as prospective jurors and declared that an acceptable jury had been found when additional veniremen from another city were on their way to the Court, notwithstanding an admission by juror Mercer, the last regular juror to be selected, that he "might be prejudiced against the defendant" because of the pre-trial publicity to which he had been exposed. Juror Mercer was subjected to extensive coaxing by the Court and, as the following colloquy demonstrates, literally had the necessary words placed in his mouth before being approved.

> THE COURT: Now, you indicated that you have read something in the paper about this? By virtue of what you have read, have you formed an opinion as to the case?
>
> MR. MERCER: I don't know if it is an opinion. I think I might say I might be prejudiced against the Defendant.
>
> * * * *
>
> MR. KINNEY [defense counsel]: When the Judge was questioning you initially, you said you had read something in the paper and you felt it prejudiced you? Is that correct?
>
> MR. MERCER: That is what I said.
>
> MR. KINNEY: Prejudiced you against the Defendant or against the State?
>
> MR. MENSH [prosecutor]: I object to that question, Judge.
>
> THE COURT: I don't believe he said that, Mr. Kinney. That isn't my recollection of what he said.
>
> MR. KINNEY: Well, he just said it again, so let me ask him if there is any doubt. Did what you read in the paper prejudice you?

MR. MERCER: I don't think I took it that personally. What I said was I thought it might.

MR. KINNEY: You thought it might. Okay, we are playing with words, then. It might prejudice you?

MR. MERCER: Yes.

MR. KINNEY: What was it about it that you felt it might prejudice you?

MR. MERCER: That I can't tell you.

MR. KINNEY: Meaning you can't because you won't or you can't because you don't know?

MR. MERCER: I can't because I don't know.

MR. KINNEY: But you still have that feeling of prejudice? Right?

MR. MERCER: I might, I don't know. Reasonable to believe it.

MR. KINNEY: That "might prejudice" you that you had, was that against the Defendant?

MR. MERCER: Yes.

MR. KINNEY: Your Honor, I want to move to excuse this juror for cause. Let me tell you my reason. I have exhausted my challenges. This may [sic] says he might be prejudiced.

THE COURT: No, he said he may have been prejudiced.

MR. KINNEY: Quote, might, close quote was the word he used.

MR. DEMMI [defense counsel]: "Might have prejudice."

MR. KINNEY: And in a spirit of fairness to this Defendant, the Court may well recognize there is a danger to this jury in having a man who may be prejudiced. Excuse the man for cause.

THE COURT: All right, sir I am going to ask Mr. Mercer a couple of more questions. Then I will rule.

THE COURT: Mr. Mercer, what the Court is concerned with is whether or not, regardless of how you may have felt at the time you did this, what

are you [sic] feelings now as to whether or not you can give this Defendant and the State of Florida a fair and impartial trial as you sit here at this moment? Do you feel you can bring a verdict based solely on the evidence presented to you in this Court and the law you will be instructed on?

MR. MERCER: I think so.

THE COURT: Is there any doubt in your mind?

MR. KINNEY: May the record reflect, he shrugged his shoulders?

THE COURT: You are going to have to answer my question, Mr. Mercer. Is there any doubt in your mind as you sit here right now you have any prejudice against this Defendant or against the State of Florida or in favor of the Defendant or in favor of the State of Florida.

MR. MERCER: No I have no prejudice against the man or against the State. No.

THE COURT: And you feel, as you sit here right now you can fairly and impartially try this case?

MR. MERCER: I believe so.

THE COURT: All right, Mr. Kinney, the motion will be denied at this time.

MR. KINNEY: Approach the bench:

MR. KINNEY: Your Honor, I would like to renew the Motion and I call the Court's attention again to the fact that we have no further challenges left. The man's answer shows some hesitancy. He shrugged his shoulders in one instance. He said "I believe so," in another. I believe that ought to create sufficient doubt in the Court's mind, in the interest of justice, to grant my request that this juror be excused for cause.

THE COURT: The Motion will be denied.

(Tr. Vol. VI, 877-891.)

In deposition and at trial Judge Fogle testified that petitioner approached him with a bribe offer in the late afternoon of July 17, 1975. (Tr. Vol. XVI, 2517; Vol. VII, 1017.) He stated that after the offer, he con-

tacted the State's Attorney for the Sixth Judicial District, James T. Russell, and met with Mr. Russell and an assistant, Paul Meissner at his home that evening. (Tr. Vol. VII, 1019.) Both Mr. Russell and Mr. Meissner prosecuted the case and Judge Andrews rejected defense efforts to examine them under oath as to the procedures employed in the phone monitoring and other phases of the investigation.

Judge Fogle further testified that Messrs. Russell and Meissner provided him with a telephone monitoring device which he was able to activate on a selective basis (Tr. Vol. VII, 1022.) Judge Fogle identified tape recordings of conversations with petitioner and he testified to other meetings with petitioner, which meetings were the subject of partial surveillance by local detectives. (Tr. Vol. VII, 979-990.) The detectives testified that they observed meetings between Judge Fogle and petitioner at Lum's restaurant in Pinellas Park on July 22 and October 9, 1975, and that they took photographs. (Tr. Vol. VIII, 1229, 1240.) The officers were not able to testify as to any conversations between Judge Fogle and petitioner.

The jury heard conversations tape recorded on July 22, 23 and 24; August 7, 11 and 23; September 9, 12, 14 and 25; and October 9, 1975. Petitioner admitted participating in the phone conversations and to the use of a code suggested by Judge Fogle for those conversations. (Tr. Vol. X, 1662.) Judge Fogle stated that he had recorded all but one or two of his conversations with petitioner, (Tr. Vol. VII, 1023) but petitioner testified that many of the telephone conversations with the Judge had not been recorded. (Tr. Vol. IV, 540.)

The Government's case rested largely on the testimony of Judge Fogle. The critical meetings and conversations were *not recorded* and depended upon Judge Fogle's credibility. The Judge stated that at the first meeting

petitioner offered to split one hundred thousand dollars with him if he would arrange for the release of about three hundred thousand dollars seized during the arrest of Marvin Flowers. He stated that he immediately resolved to feign interest in the scheme in order to learn the identities of the principals. (Tr. Vol. VII, 1011-1018.)

The Judge described subsequent meetings with petitioner on July 22 and October 9, 1975, both of which occurred in petitioner's car parked at Lum's restaurant. On July 22, he said, he insisted on being paid five thousand dollars in advance, a strategy devised by the State's Attorney's Office and, further, that at the October 9 meeting petitioner promised him five thousand dollars if he would refuse to raise the bond of Harry Hoffman. The Judge admitted that he never received any money. (Tr. Vol. VII, 1071-1072.)

Dr. Benefield denied Judge Fogle's allegations. He said that he responded to a message from the Judge left on his answering service on or about June 7, 1975, some six weeks before the Judge stated the first bribe offer took place. In response to the message, he met the Judge in the week of June 9 at Lum's restaurant in the company of his older brother, Curtis L. Benefield. Petitioner stated that Judge Fogle met them at the restaurant and that in the presence of his brother the Judge inquired after Harry Hoffman's attorney, Henry Gonzalez, Esq. At that point, Judge Fogle ushered Dr. Benefield away from the table where his brother was seated and asked petitioner to convey to Mr. Gonzalez a proposal to split the money seized from Flowers. (Tr. Vol. X, 1621-1622.)

Petitioner testified that he viewed the proposal as absurd and took no action on it. He stated that on the weekend of July 4, he had a brief discussion with Mr.

Gonzalez whom he chanced to meet at the beach and that he indirectly broached the subject with Mr. Gonzalez. At a subsequent meeting with Judge Fogle, petitioner recalled, he declined any further involvement. Judge Fogle informed him that he was already involved and that if he failed to cooperate, the Judge would go to the authorities. Thereafter, petitioner cooperated only under the Judge's threats and in the hope that the Judge would abandon his scheme. (Tr. Vol. X, 1729.)

Petitioner's testimony was corroborated generally by his wife, his two brothers, and his daughter. (Tr. Vol. VIII, 1277-1310; Vol. IX, 1336-1422.) At the close of the case, both the Government and the defense argued to the jury that the central issue was credibility, and the Judge instructed the jury on that issue. (Tr. Vol. XI, 1798, 1833.)

REASONS FOR GRANTING THE WRIT

I. The Failure of the Trial Judge to Recuse Himself From a Bribery Case in Which the Government's Chief Witness was a Supervisory Judge of the Same Bench Deprived Petitioner of His Federal Constitutional Right to a Fair and Impartial Trial.

This case presents a serious problem of recurring frequency both in state and federal criminal litigation—recusal of the trial judge in circumstances demonstrating bias, both in appearance and in actuality. The fabric in which this petitioner's claim is presented is particularly stark and compelling. As set forth below, it involves his adjudication of guilt before a state circuit court judge in a criminal proceeding in which the principal State witness was a colleague and brother judge on the Pinellas County Circuit. Petitioner's ability to obtain unbiased adjudication of his case was impaired not merely by the general judicial relationship that trial judge and chief accuser shared, but also by the fact that

the chief witness, Judge Fogle, sat in a superior capacity to the trial judge and controlled various administrative assignments affecting him. As set forth below, that relationship made it impossible for the trial court to render in appearance and in fact fair and impartial rulings on important matters relating to the credibility of Judge Fogle, to the scope of permissible cross-examination and to other evidentiary matters directly affecting the witness. Petitioner suffered a substantial due process denial as a result.

This Court has periodically reaffirmed the Fifth Amendment due process guarantee of every defendant in a criminal proceeding—state or federal—to a fair and impartial adjudicative process. Neither improperly empaneled grand juries nor biased pettit juries are permissible within due process concepts. *Peters* v. *Kiff*, 407 U.S. 993 (1972); *Irvin* v. *Dowd*, 366 U.S. 717 (1961). And the ultimate arbiter of the trial process, the trial judge, must himself be fair and impartial. *Estelle* v. *Williams*, 425 U.S. 501 (1976); *Withrow* v. *Larkin*, 421 U.S. 35 (1975); *Taylor* v. *Hayes*, 418 U.S. 488 (1974); *Webb* v. *Texas*, 409 U.S. 95 (1972); *Mayberry* v. *Pennsylvania*, 400 U.S. 455 (1971); *Ungar* v. *Sarafite*, 376 U.S. 575 (1964); *In re Murchison*, 349 U.S. 133 (1955); *Tumey* v. *Ohio*, 273 U.S. 510 (1927).

These cases memorialize the general constitutional postulate that due process prevents a judge from trying a case in which he has a direct personal interest. The contours of the broad constitutional test, however, and the extent to which it differs from common law notions on recusal,[2] are not immediately clear, since past de-

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[2] Early American common law accepted the English common law grounds for recusal—pecuniary interest, relationship to a party, and previous involvement as counsel in the case. See Note, Disqualification of Judges for Bias in Federal Courts, 79 Harv. L. Rev. 1435 (1966).

cisions of the Court have focused instead on the peculiar facts of the case at hand.

There are certain situations in which constitutionally required recusal may be found because "the probability of actual bias on the part of a judge is too high to be constitutionally tolerable," [3] as for example where the same judicial officer initiates contempt charges and thereafter sits in judgment of them [*In re Murchison*, 349 U.S. 133 (1955)]; where the trial judge has an actual pecuniary interest in the outcome of the trial [*Tumey* v. *Ohio*, 273 U.S. 510 (1927)]; or, where in a contempt proceeding the court has been the target of personal abuse and criticism from the party before it [*Mayberry* v. *Pennsylvania*, 400 U.S. 455 (1971)].

This Court most strongly enunciated the underlying sense of unfairness governing constitutional recusal because of bias in *In re Murchison*, 349 U.S. 133 (1955). The case involved an appeal from a contempt conviction by a policeman/witness. He had been cited by the same judge—acting as a "one-man" grand jury—in a previous proceeding. The issue was whether such a contempt proceeding, involving the judge as accuser and trier of fact, comported with due process. This Court granted certiorari and reversed the conviction, saying:

> A fair trial in a fair tribunal is a basic requirement of due process . . . Fairness, of course, requires an absence of actual bias on the trial of cases.

Id. at 136.

The broad statement of due process protection in *Murchison* has been echoed by many later courts. In *Taylor* v. *Hayes*,[4] another contempt proceeding case, this Court overturned the state court conviction, relying on

[3] *Withrow* v. *Larkin*, 421 U.S. 35, 47 (1975).

[4] 418 U.S. 488 (1974).

Murchison. The Court looked at the extreme personal abuse directed at the judge by the defendant and found grounds for recusal. Again the Court spoke in broad terms:

> In making the ultimate judgment, the inquiry must be not only whether there was actual bias on respondent's part, but also whether there was such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between the interests of the court and the interests of the accused.[5]

Most recently, in *Estelle* v. *Williams*, 425 U.S. 501, 48 L.Ed2d 126 (1976), the Court reemphasized its concern for the presence of constitutional bias, noting that "the probability of deleterious effects on fundamental rights calls for close judicial scrutiny." [6] *Id.* at 504.

In the case at bar, actual bias, as well as its appearance, was manifested from a variety of circumstances. *First*, the chief State witness, Judge Fogle, was a colleague and fellow judicial officer of the trial judge,

[5] *Id.* at 501, quoting *Ungar* v. *Sarafite*, 376 U.S. 575 (1965).

[6] Congress has attempted to redress the problem of recusal in federal courts through passage of 28 U.S.C. § 455. Enacted in 1974, § 455 codifies the standards of Canon 3C of the American Bar Association *Code of Judicial Conduct*. Under earlier federal recusal statutes, the recusal decision was left to the subjective opinion of the trial judge and his own personal sense of impropriety. Section 455 mandates recusal "in any proceeding in which (the court's) impartiality might reasonably be questioned." Actual bias need not be shown. The objective appearance of partiality is sufficient.

The Florida statute, however, contains no such provisions. Rule 3.230, Fla. Rules of Criminal Procedure, superceding Fla. Stat. Ann. § 38.02 in criminal cases, provides that the State or the defendant may move to disqualify a judge on grounds, *inter alia*, of prejudice against the movant or in favor of the State but must prove the allegations of prejudice by affidavit evidence.

Judge Andrews. The professional relationship between the two, as experienced members of the Pinellas County Circuit Court, is beyond dispute. (Tr. Vol. I, 133-138.) *Second*, the closeness of the relationship was enhanced by the size of the Pinellas County criminal bench. It had but three members, Judge Driver (himself removed from the case by mandamus), Judge Andrews (the trial judge) and Judge Fogle (the key witness). Unlike some jurisdictions in which the trial bench is large and diffuse, the Pinellas County Circuit Court criminal bench had a small and close-knit judiciary. (Tr. Vol. III, 347-350.)

Third, the closeness of the professional and personal relationship between trial judge and accuser was also geographic. The quarters occupied by Judge Fogle and Judge Andrews were located in the courthouse in close proximity and it was common practice for Judge Fogle to share his chambers with the other two judges assigned to the criminal bench when convenient. During the period of petitioner's investigation in 1975 and early 1976, and during the pretrial and trial periods that followed, Judge Andrews had access to and continuing contact with Judge Fogle. (Tr. Vol. III, 363-366.)

Fourth, Judge Fogle held the position of Chief Administrator of the Pinellas County Circuit Court. His responsibilities included matters of calendaring that directly affected other sitting judges, including Judge Andrews, and made Judge Fogle in this regard a superior judicial officer. (Tr. Vol. I, 133-140, 143-144.)

Fifth, in addition to the closeness of the relationship between Judge Fogle and Judge Andrews, the nature of the trial proceeding and the allegations against petitioner themselves greatly aggravated the problem of bias. Judge Fogle, after all, was a complaining witness in a matter involving serious allegations of bribery. The defense contention was that Judge Fogle himself was the wrongdoer and had initiated the bribe attempt. Thus, unlike

many common law felonies where a complaining witness, if disbelieved, incurs no sanction or ingnominy, petitioner's acquittal here would have implicated Judge Fogle quite directly. The very reputation of Judge Fogle and the Pinellas County bench was put in issue. One can hardly expect Judge Andrews to have been fairly receptive to defense efforts to prove his brother jurist, office colleague and senior administrator the guilty party.

Sixth, the appearance of partiality was overwhelming, both from the circumstances that we have set forth above and from the manner by which the trial was conducted. Motions for change of venue were summarily denied as well as petitioner's repeated and reasonable requests for a brief continuance. (Tr. Vol. VII, 936-937; Vol. V, 717.) Judge Andrews understandably but unfairly indicated his intention to dispose of the unfortunate business of the case and the allegations surrounding Judge Fogle with all possible dispatch. To this end, Judge Andrews adhered rigidly to the existing trial date, gave the parties no reasonable time to complete the taking of depositions to which they were entitled and refused to set aside reasonable time within which to hear and adjudicate remaining pre-trial motions. On the morning of trial, the court refused to wait for additional veniremen to arrive from another county to supplement the small panel that had been selected, and aggresively coaxed the final remaining juror, juror Mercer, into jury service. The court admonished counsel that it would thereafter work evenings and weekends to conclude the trial as quickly as possible. During crucial phases of the cross-examination of Judge Fogle, Judge Andrews intervened. He abruptly enjoined petitioner's inquiry into the matters surrounding Judge Fogle's finances, a matter quite relevant since petitioner's contention was that Judge Fogle was in need of the money at issue and had initiated the bribe attempt for that reason. (Tr. Vol. IV, 593, 597.) Judge Andrews turned aside criticism of Judge

Fogle's responsiveness in answering questions posed by petitioner's counsel. (Tr. Vol. VIII, 1182-1183.) And Judge Andrews was generally unreceptive to challenges to Judge Fogle's credibility, an issue central to pretrial and trial matters, both with respect to his recital of the alleged bribe attempts and his claimed consent to the warrantless taping of his telephone communications.

In these circumstances, the failure of Judge Andrews to disqualify himself abridged petitioner's due process right to a fair and impartial adjudication of his case. It abridged the general due process rights to impartiality and the appearance of impartiality adverted to in *Murchison* and *Taylor*. Indeed, the failure of recusal was likely contrary to pronouncements of the Florida Supreme Court. See, *e.g.*, *Williams* v. *State*, 143 So.2d 484 (Fla. 1962); *State, ex rel. Davis* v. *Parks*, 194 So. 613 (Fla. 1939); *Aulday* v. *State*, 166 So. 826 (Fla. 1936); *State, ex rel. Meckle* v. *Rowe*, 131 So. 331 (Fla. 1930).

Nonetheless, in the absence of precedent squarely holding that where a fellow judge is a material witness in a matter in which the trial court may be called upon to render determinations as to his credibility and the scope of permissible cross-examination the high probability of bias requires recusal, the present standards of *Murchison* and *Taylor* remain elusive enough to permit the miscarriage of justice that occurred here. This case allows the Court the opportunity to delineate yet another situation of presumptive bias and the appearance of partiality. Alternatively, it allows the Court the opportunity to specify constitutional guidelines for the application of bias doctrine that will enable state courts better to apply the principles that underly *Murchison* and *Taylor* and thus minimize the kind of due process deprivation to which this petitioner was subject.

II. The Repeated Warrantless Electronic Recordation of Petitioner's Telephone Conversations Violated Petitioner's Fourth Amendment Rights.

Judge Fogle was not merely petitioner's former attorney and chief accuser. He was also the chief investigative tool in the development of the State's case against petitioner. Judge Fogle asserted that petitioner approached him on July 17, 1975 with the bribe offer; he thereafter advised the State's Attorney for Pinellas County of the matter; and, at the State's Attorney's behest and instruction, he allowed an electronic device to be attached to his telephone. No warrant was obtained. Judge Fogle subsequently taped numerous telephone conversations with petitioner over the next few months, none with petitioner's knowledge or consent. Although selectively made and not covering any of the face-to-face conversations between petitioner and Judge Fogle, the State sought and was allowed to introduce the taped telephone communications over petitioner's strong objections. Each of these taped communications were played to the jury. (Tr. Vol. VII, 1028-1068.)

The introduction of these taped conversations, obtained without warrant at governmental direction, was error and constituted substantial violation of petitioner's Fourth Amendment rights. "Though physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed, its broader spirit now shields private speech from unreasonable surveillance." *United States* v. *United States District Court* (*Keith*), 407 U.S. 297, 313 (1972). The unreasonable "recording of oral statements . . . without any 'technical trespass under . . . local property law'" is one such violation of that shield. *Katz* v. *United States*, 389 U.S. 347, 353 (1967). See also *Berger* v. *New York*, 388 U.S. 41 (1967). The *Katz* reformulation of Fourth Amendment doctrine regarding seizure of oral communications has, in the twelve

years since its announcement, become an axiom of our jurisprudence. Fourth Amendment values are essentially expectational and expectations of privacy surrounding oral communications "that society is prepared to recognize as 'reasonable'" are sufficient to clothe the communications with all of the protections of the Fourth Amendment. *Katz* v. *United States*, 389 U.S. 347, 361 (1967) (Harlan, J. concurring).

This Court has twice in the last two decades faced the general problem of warrantless eavesdropping by consent of one party to a conversation. In *Lopez* v. *United States*, 373 U.S. 427 (1963), the Court validated a government agent's warrantless and unconsented recordation of his conversation with a bribery suspect, reasoning that because the agent was lawfully upon the premises of the suspect, no Fourth Amendment violation occurred. *Id.* at 438.

Katz having rendered this framework of analysis obsolete, the Court again confronted the general issue in *United States* v. *White*, 401 U.S. 745 (1970). There, again over substantial dissent, the Court validated the warrantless and unconsented broadcast by radio transmitter of communications between a government informant and the defendant. The majority reasoned that society ought not denominate as "justified" an expectation of privacy of communication between persons engaged in criminal ventures. On grounds that were both empirical and normative, the majority asserted that there existed no persuasive evidence that a defendant's utterances would be any different if he thought it possible for police to wire a colleague for sound nor should a defendant have the ability to prevent the use of that "probative evidence." *Id.* at 752.

In the nine years since *White* was decided, however, both the empirical and normative bases for its holding have been repeatedly called into question. Courts no

longer put the empirical issue as did the *White* court. No one would argue, for example, that the possibility of informant cooperation validates the consensual long-term bugging of a room. *United States* v. *Padilla*, 520 F.2d 526 (1st Cir. 1975). That asserted wrongdoers may suspect betrayal by colleagues does not deprive them of demonstrable subjective feelings of privacy. This Court has itself recently acknowledged that such subjective expectations may routinely be "thoroughly justified." *Rakas* v. *Illinois*, 58 L. Ed. 2d 387, 401, fn. 12 (1978). In the area of wire interception, it is particularly the case that courts have shied away from denominating expectations of privacy in telephonic communications subjectively unjustified. See, *e.g.*, *United States* v. *United States District Court* (*Keith*), 407 U.S. 297 (1972).[7]

The normative justification for *White* is itself now open to question. One must determine whether there exists a general "understanding" that is "recognized and permitted by society" that telephonic communications have a sanctity such that they may not be intruded upon, even by secret recordation, absent utilization of the warrant procedure. That indeed they are so clothed is the implicit holding of *Keith*, where the Court speaks repeatedly of improprieties created by "broad and unsuspected governmental incursions into conversational privacy" by electronic surveillance. *Id.* at 314. Moreover, the *Keith* court pointedly omits any reference to *White*

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[7] We also note, although the point needs little elaboration, that to limit the class of persons whose expectations are the subject of analysis to actual wrongdoers, as did the *White* court, effectively uses the fruits of the search to justify its legality. More important, it presumes that law enforcement officials will never utilize the techniques of investigation in question against persons who may be innocent, an assumption courts are not now willing to make. See, *e.g.*, *United States* v. *United States District Court (Keith)*, 407 U.S. 297, 312 (1972). ("There is, understandably, a deep-seated uneasiness and apprehension that this capability will be used to intrude upon cherished privacy of law-abiding citizens." Footnote omitted.)

or *Lopez* in its otherwise complete list of cases involving "exceptions to the warrant requirement." *Id.*, at 318. And the *Keith* court reaffirmed that where practicable, police must obtain "advance judicial approval of searches and seizures through the warrant procedure." *Id.* at 318, quoting *Terry* v. *Ohio*, 392 U.S. 1, 20 (1968).

We close by noting the length and intrusiveness of this particular surveillance of petitioner's communications. Not a one-time overhearing as in *Lopez* or *White* and not directed to development of corroborative evidence of limited conversations, this series of overhearings was instead nothing less than an exhaustive ongoing criminal investigation conducted through recorded telephone conversations. This several-month warrantless surveillance finds no analogue in cases from this Court. Nor does the record suggest any reason why judicial authority could not have been utilized in the normal warrant procedure.[8] It surely falls within the commands of *Katz* and *Keith* as an intrusion by electronic device into "conversational privacy" that can be undertaken only in conformance with Fourth Amendment safeguards.

III. The Failure of the Trial Judge to Strike For Cause a Juror Who Admitted Prejudice Deprived Petitioner of His Federal Constitutional Right to a Fair and Impartial Trial.

This Court has squarely held that "the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court —would come within the Sixth Amendment's guarantee." *Duncan* v. *Louisiana*, 391 U.S. 145, 149 (1968).[9] It is

[8] It is apparent that Judge Fogle could not himself validate the search, since he was an active participant at the behest of the police. See *Lo-Ji Sales, Inc.* v. *New York*, No. 78-511, decided June 11, 1979.

[9] Petitioner was charged with two counts of bribery of a judicial officer, each of which carried a five-year maximum term of imprisonment, and thus would have been entitled to a jury trial in federal court.

axiomatic that incident to the right to trial by jury is the right to an impartial jury. As this Court has observed:

> In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, "indifferent" jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. [citing *In re Oliver*, 333 U.S. 257 (1947) and *Tumey* v. *Ohio*, 273 U.S. 510 (1926).]

Irvin v. *Dowd*, 366 U.S. 717, 722 (1961).

In *Irvin*, the defendant was charged with multiple murders in a small midwestern community. His case had been highly publicized. Although the trial judge personally examined those veniremen whom the defendant insisted should be excused for cause and each indicated that notwithstanding the publicity he could render an impartial verdict, the Court found the evidence of pretrial prejudice so pervasive it concluded that the jurors' states of mind had to have been improperly affected.[10] The Court's holding reflects its abiding concern "that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether by private talk or public print." *Patterson* v. *Colorado*, 205 U.S. 454, 462 (1907). The Court's settled test for prejudice is "whether the nature and strength of the opinion formed are such as in law necessarily . . . raise the presumption of partiality." *Reynolds* v. *United States*, 98 U.S. 145, 156 (1879).

[10] The problem of juror impartiality is particularly acute where pre-trial publicity is massive. In that event, the trial court has an obligation to take strong measures to safeguard the due process rights of the accused. *Shepard* v. *Maxwell*, 384 U.S. 333, 362 (1966).

In petitioner's case, considered in light of the massive pre-trial publicity, the process of jury selection generally and the impaneling of juror Mercer in particular, make the inference of prejudice inescapable.

Petitioner was a well-known citizen of Pinellas County and his arrest on charges of attempting to bribe a local judge received intense media coverage. The trial judge eschewed the command of *Shepard* v. *Maxwell*, 384 U.S. 333, 362 (1966) and refused either to continue petitioner's case until public interest abated or to grant a change of venue to a county other than the one where the publicity originated. ((Tr. Vol. V, 717; Vol. VII, 937.) Instead Judge Andrews pressed the case to trial in Pinellas County barely two months after petitioner's well-publicized arrest.

Petitioner's pre-trial request for twelve peremptory challenges instead of six was summarily denied.[11] Only twenty-two (22) veniremen were summoned as prospective jurors, all from Pinellas County. More than half of those questioned had read or heard about petitioner's case. Consequently, petitioner twice moved the trial court to summon additional veniremen from another county. Before they arrived, however, Judge Andrews declared he was satisfied that an impartial jury had been found (Tr. Vol. VII, 936), notwithstanding the fact that three of the six jurors selected had read about petitioner's case and five of the six were familiar with the drug smuggling case petitioner was alleged to have attempted to influence.

The last juror to be impaneled over petitioner's motion to strike for cause, juror Mercer, had declared in voir dire: "I think I might say I might be prejudiced against

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[11] Rule 3.350(3), Fla. Rules of Criminal Procedure, gave the trial court discretion to allow additional challenges where, as in petitioner's case, the indictment contained two or more counts.

the defendant." (Tr. Vol. VI, 878.) Apparently eager to complete jury selection, Judge Andrews probed juror Mercer's statement of prejudice and induced him to recant. (Tr. Vol. VI, 891.)

Petitioner did not receive a fair and impartial trial from the six jurors who heard his case. Juror Mercer told the trial court as much.

CONCLUSION

WHEREFORE, petitioner respectfully asks that the writ of certiorari issue.

Respectfully submitted,

ROGER E. ZUCKERMAN
WILLIAM W. TAYLOR, III
RICHARD A. STANLEY
ZUCKERMAN, SPAEDER & TAYLOR
1800 M Street, N.W.
Suite 375 North
Washington, D.C. 20036
Telephone: 202/223-8606

APPENDIX

APPENDIX

IN THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

July Term, A. D. 1977

Case No. 76-1198

J. C. BENEFIELD,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

Opinion Filed September 21, 1977

Appeal from the Circuit Court for Pinellas County;
John S. Andrews, Judge

John D. Demmi, Michael L. Kinney, and Richard A. Lazzara, Tampa, for Appellant.

Robert L. Shavin, Attorney General, Tallahassee, and Richard G. Pippinger, Assistant Attorney General, Tampa, for Appellee.

PER CURIAM.

After jury trial appellant was found guilty on two counts of bribery, one count in violation of Section 838.01, Florida Statutes (1973), and the other count in violation of Section 838.015, Florida Statutes (1975), both of which are third-degree felonies. He was sentenced to a ten-year term of imprisonment with credit for time served in jail awaiting trial.

The points relied upon by appellant for reversal have been carefully considered in the light of the record and briefs, and we hold no reversible error has been made to appear. It is necessary, however, for the case to be remanded to the trial court for correction of appellant's sentence. It is apparent from our reading of the colloquy at the sentencing hearing that the trial court intended to impose the maximum sentence available, *i.e.*, five-year consecutive sentences on the charged offenses [1] which, we submit, would have been proper. The judgment and sentence rendered in this case shows that the trial court did not carry out his expressed intention, but imposed a single general sentence, which is improper. Darden v. State, 306 So. 2d 581 (Fla. 2d DCA 1975). *See also* Darden v. State, 330 So. 2d 750 (Fla. 2d DCA 1976).

Therefore, the convictions are affirmed, but the general sentence is vacated. The case is remanded for resentencing in order that the judgment and sentence may reflect the imposition of sentence announced by the trial court in open court. It is not necessary that appellant be present in court for this purpose.

BOARDMAN, C.J., and GRIMES and OTT, JJ., Concur.

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[1] Sec. 775.082(3), Fla. Stat. (1975) provides that the maximum prison sentence for a third degree felony is five years.

SUPREME COURT OF FLORIDA
DISTRICT COURT OF APPEAL
SECOND DISTRICT

Thursday, December 21, 1978

Case No. 52,921

76-1198

J. C. BENEFIELD,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5c(6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

ENGLAND, C.J., BOYD, OVERTON, SUNDBERG and ALDERMAN, JJ., Concur

ADKINS, J., Dissents with an opinion

HATCHETT, J., would treat as habeas corpus and issue Order to Show Cause

A True Copy

TEST:

Sid J. White

Clerk Supreme Court.

C
cc: Hon. William A. Haddad, Clerk
Hon. Harold Mullendore, Clerk
Hon. John S. Andrews, Judge
List of Attorneys and their
address on next page

Attorneys for Petitioner

Daniel J. Wiser, Esquire
of Roberts, Miller, Baggett & LaFace
P. O. Box 1752
Tallahassee, Florida 32302

John D. Demmi, Esquire
725 East Kennedy Boulevard
Tampa, Florida 33602

Richard A. Lazzara, Esquire
202 South Governor Street
Tampa, Florida 33602

Michael L. Kinney, Esquire
602 East Twiggs Street
Tampa, Florida 33602

Attorneys for Respondent

Robert L. Shevin, Esquire
Attorney General
The Capitol
Tallahassee, Florida 32304

Richard G. Pippinger, Esquire
Assistant Attorney General
412 East Madison Street
Suite 800
Tampa, Florida 33602

ADKINS, J., Dissenting.

The decision of the District Court of Appeal holding that the trial court did not commit reversible error in failing to grant additional peremptory challenges or excuse Juror Mercer for cause is in direct conflict with the decision in *Singer* v. *State*, 109 So.2d 7 (Fla. 1959).

During the voir dire examination the following colloquy took place between Juror Mercer, the Court, Defense Attorney Kinney, and Assistant State Attorney Demmi:

"THE COURT: Now, you indicated that you have read something in the paper about this? By virtue of what you have read, have you formed an opinion as to the case?

"MR. MERCER: I don't know if it is an opinion. I think I might say I might be prejudiced against the Defendant.

* * * *

"MR. KINNEY: When the Judge was questioning you initially, you said you had read something in the paper and you felt it prejudiced you? Is that correct?

"MR. MERCER: That is what I said.

"MR. KINNEY: Prejudiced you against the Defendant or against the State?

"MR. MENSH: I object to that question, Judge.

"THE COURT: I don't believe he said that, Mr. Kinney. That isn't my recollection of what he said.

"MR. KINNEY: Well, he just said it again, so let me ask him if there is any doubt. Did what you read in the paper prejudice you?

"MR. MERCER: I don't think I took it that personally. What I said was I thought it might.

"MR. KINNEY: You thought it might. Okay, we are playing with words, then. It might prejudice you?

"MR. MERCER: Yes.

"MR. KINNEY: What was it about it that you felt it might prejudice you?

"MR. MERCER: That I can't tell you.

"MR. MERCER: Meaning you can't because you won't or you can't because you don't know?

"MR. MERCER: I can't because I don't know.

"MR. KINNEY: But you still have that feeling of prejudice? Right?

"MR. MERCER: I might, I don't know. Reasonable to believe it.

"MR. KINNEY: That 'might prejudice' you that you had, was that against the Defendant?

"MR. MERCER: Yes.

"MR. KINNEY: Your Honor, I want to move to excuse this juror for cause. Let me tell you my reason. I have exhausted my challenges. This may (sic) says he might be prejudiced.

"THE COURT: No, he said he may have been prejudiced.

"MR. KINNEY: Quote, might, close quote was the word he used.

"MR. DEMMI: 'Might have prejudice.'

"MR. KINNEY: And in a spirit of fairness to this Defendant, the Court may well recognize there is a danger to this jury in having a man who may be prejudiced. Excuse the man for cause.

"THE COURT: All right, sir I am going to ask Mr. Mercer a couple of more questions. Then I will rule.

"THE COURT: Mr. Mercer, what the Court is concerned with is whether or not, regardless of how you may have felt at the time you did this, what are you (sic) feelings now as to whether or not you can give this Defendant and the State of Florida a fair and impartial trial as you sit here at this moment? Do you feel you can bring a verdict based solely on the evidence presented

to you in this Court and the law you will be instructed on?

"MR. MERCER: I think so.

"THE COURT: Is there any doubt in your mind?

"MR. KINNEY: May the record reflect, he shrugged his shoulders?

"THE COURT: You are going to have to answer my question, Mr. Mercer. Is there any doubt in your mind as you sit here right now you have any prejudice against this Defendant or against the State of Florida or in favor of the Defendant or in favor of the State of Florida.

"MR. MERCER: No I have no prejudice against the man or against the State, No.

"THE COURT: And you feel, as you sit here right now you can fairly and impartially try this case?

"MR. MERCER: I believe so.

"THE COURT: All right, Mr. Kinney, the motion will be denied at this time.

"MR. KINNEY: Approach the bench?

"MR. KINNEY: Your Honor, I would like to renew the Motion and I call the Court's attention again to the fact that we have no further challenges left. The man's answer shows some hesitancy. He shrugged his shoulders in one instance. He said 'I believe so,' in another. I believe that ought to create sufficient doubt in the Court's mind, in the interest of justice, to grant my request that this juror be excused for cause.

"THE COURT: The Motion will be denied."

In determining whether Juror Mercer was qualified, it is appropriate to examine the news articles and other publicity disseminated immediately prior to the trial. The Petition for Writ of Certiorari includes the Motion for Change of Venue, attached to which are various news articles from the Tampa Times, the Tampa Tribune, the St. Petersburg Independent, the Clearwater Sun, and the St. Petersburg Times. It also appears from the record that numerous broadcasts of television and radio publicity

were available for the court to review. In other words, the court was aware of the publicity that had been disseminated with reference to the case of *State* v. *Benefield.* In determining the qualifications of Juror Mercer, it was incumbent upon the court to judge the juror's qualifications in the light of the attendant circumstances.

In *Singer* v. *State, supra,* a widely publicized case, the voir dire examinations of several jurors were included. Several of the jurors in *Singer* should have been excused for cause, but this Court refused to reverse the conviction for this reason due to the failure of defense counsel to state a specific ground for the challenge. Also, the Court explained that the case was being reversed for other reasons. For example, the Court said:

> "We think Mr. Stringfellow should have been excused for cause because of a reasonable doubt as to his impartiality and as to his ability to render a verdict based solely on evidence given at the trial free of the influence of his preconceived opinion and prejudice against the defendant, but again because the grounds of the challenge were not specified and because we must reverse for other reasons we will not find the refusal of the trial court to excuse him for cause to be error.
>
> "Venireman Brownlee stated that he had an opinion as to the guilt of the defendant formed from newspaper articles, that it would require evidence to change that opinion, but if such evidence were produced he could and would change his opinion. He was challenged for cause but the specific basis for the challenge was not specified. For this reason and because we must reverse for other reasons no error will be found here." 109 So.2d at 19.

After discussing several decisions relating to the rule to be followed in determining the competency of jurors, the Court said:

> "The above quotations must be construed as being guides to the trial courts in exercising their discretionary power in determining the competency of jurors. They demonstrate that the goal to be sought is a jury composed of persons whose minds are free of any preconceived opinions of the guilt or innocence of an accused, persons who can in fact give to an accused the full benefit of the presumption of innocence, persons who can because of freedom from knowledge of the cause decide it solely on the evidence submitted and the law announced at the trial.
>
> "These cases illustrate that if there is basis for any reasonable doubt as to any juror's possession that state of mind which will enable him to render an impartial verdict based solely on the evidence submitted and the law announced at the trial he should be excused on motion of a party, or by the court on its own motion.
>
> "Too, a juror's statement that he can and will return a verdict according to the evidence submitted and the law announced at the trial is not determinative of his competence, if it appears from other statements made by him or from other evidence that he is not possessed of a state of mind which will enable him to do so." 109 So.2d at 23.

The offense charged, attempted bribery of a judicial officer, was an atrocious one. The pretrial publicity included references to court records disclosing that the judicial officer, while a defense attorney, represented Benefield in 1961 for allegedly soliciting a bribe for a pending liquor license. Benefield was convicted of a reduced charge of attempted grand larceny, but the conviction was overturned by this Court on the ground there had been an illegal search and seizure in the case. He was not retried.

Regardless of the nature of the charge, Benefield was entitled to a trial by a fair and impartial jury. The fact that a juror was aware of the details of defendant's previous conviction of a former offense would tend to corrupt the entire proceeding, for no juror should be expected to disregard this information during his deliberation. The improper admission of evidence of such prior conviction would be fundamental error, that is, the prejudicial effect of such evidence could not be erased from the minds of the jurors by instruction from the court. By the same token, such knowledge obtained from the news media invades the mind of the juror to such an extent that his judgment is infected with a cancerous germ of prejudice.

In considering the entire examination of Juror Mercer, it does not appear that his mind was free of a preconceived opinion. The decision of the District Court of Appeal in affirming the ruling of the trial court was in conflict with the principles enunciated in *Singer* v. *State, supra,* in determining the competency of Juror Mercer.

We have jurisdiction. We should, therefore, examine the complete record and determine whether the defendant received a trial by a fair and impartial jury as guaranteed him by both the federal and state constitutions.

IN THE SUPREME COURT OF FLORIDA
DISTRICT COURT OF APPEAL
SECOND DISTRICT

Case No. 52,921

Friday, April 20, 1979

J. C. BENEFIELD,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

Upon consideration of the Petition for Rehearing filed by attorneys for Petitioner,

IT IS ORDERED by the Court that said Petition be and the same is hereby denied.

ENGLAND, C.J., ADKINS, BOYD, OVERTON, SUNDBERG and ALDERMAN, JJ., concur

HATCHETT, J., dissents

Petitioner's Motion for Stay is hereby granted and proceedings in this Court; in the District Court of Appeal, Second District of Florida; and in the Circuit Court of the Sixth Judicial Circuit in and for Pinellas County, Florida are hereby stayed to and including May 21, 1979, to allow Petitioner to seek review in the Supreme Court of the United States and obtain any further stay from that Court.

TC

cc: Hon. William A. Haddad, Clerk
Hon. John S. Andrews, Judge
Hon. Harold Mullendore, Clerk

Hon. B. K. Roberts
John S. Miller, Jr., Esquire
John D. Demmi, Esquire
Richard A. Lazzara, Esquire
Michael L. Kinney, Esquire
Hon. Jim Smith
Richard G. Pippinger, Esquire

A True Copy

TEST:

/s/ Sid J. White
SID J. WHITE
Clerk, Supreme Court

Supreme Court, U. S.
FILED
NOV 8 1979
MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 79-209

J. C. BENEFIELD,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONSE AND APPENDIX TO PETITION FOR WRIT OF CERTIORARI

JIM SMITH
ATTORNEY GENERAL

MICHAEL J. KOTLER
Assistant Attorney General

CHARLES CORCES, JR.
Assistant Attorney General
Park Trammell Building
1313 Tampa Street
Suite 804
Tampa, Florida 33602

Counsel for Respondent

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 79-209

J. C. BENEFIELD,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONSE TO
PETITION FOR WRIT OF CERTIORARI

The State of Florida, Respondent, files this response as directed by this Court and moves that the writ of certiorari be denied.

OPINIONS BELOW

The opinion of the Florida District Court of Appeal, Second District, is reported at 351 So.2d 56 and

appears in the Petitioner's Appendix as "1a-2a". The order of the Florida Supreme Court, dated December 21, 1978, declining to issue a writ of certiorari to the Florida District Court of Appeal appears in the Petitioner's Appendix as "3a-10a". The order of the Florida Supreme Court, dated April 20, 1979, denying rehearing appears in the Petitioner's Appendix as "11a-12a".

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

I.

WHETHER PETITIONER WAS DENIED DUE PROCESS OF LAW IN HIS TRIAL FOR ATTEMPTED BRIBERY OF THE

ADMINISTRATIVE JUDGE OF THE CIRCUIT COURT FOR PINELLAS COUNTY, FLORIDA, WHEN THE TRIAL JUDGE DECLINED TO RECUSE HIMSELF?

II.

WHETHER THE TRIAL COURT PROPERLY ADMITTED WARRANTLESS TAPE RECORDINGS OF TELEPHONE CONVERSATIONS BETWEEN PETITIONER AND THE GOVERNMENT'S KEY WITNESS?

III.

WHETHER PETITIONER WAS DENIED HIS RIGHT TO DUE PROCESS OF LAW BY THE TRIAL COURT'S REFUSAL TO EXCUSE A JUROR?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution which provides in relevant part:

> . . . nor shall any State deprive any person of life, liberty or property without due process of law.

The Fourth Amendment to the United States Constitution which provides:

> The right of the people to be secure in their persons, houses, papers and affects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE AND FACTS

The facts are sufficiently set forth in the petition for writ of certiorari filed in this Honorable Court (Petition at pages 3-12) and will not be repeated here except to add the following:

1) The second judge (Andrews),

appointed to preside over Petitioner's trial, specifically denied prejudice for or against either party.

2) Judge Fogle gave his consent to the recording of his conversations with Petitioner, and testified to this consent at trial.

ARGUMENT

I.

WHETHER PETITIONER WAS DENIED DUE PROCESS OF LAW IN HIS TRIAL FOR ATTEMPTED BRIBERY OF THE ADMINISTRATIVE JUDGE OF THE CIRCUIT COURT FOR PINELLAS COUNTY, FLORIDA, WHEN THE TRIAL JUDGE DECLINED TO RECUSE HIMSELF?

Florida adequately provides for the protection of Petitioner's constitutional rights. Fla. R. Crim. P. 3.230 [A.1a-3a] provides for the

disqualification of the judge assigned to try a cause when the judge is prejudiced against the movant or in favor of the adverse party. Defendant's motion must be in writing, supported by affidavits setting forth the grounds for disqualification. If the motion and affidavits are legally sufficient, the presiding judge shall enter an order disqualifying himself. After the first judge is disqualified, another judge is assigned to act in lieu of the disqualified judge. He should not be disqualified on account of alleged prejudice unless he shall admit that he cannot stand fair and impartial between the parties.

In the instant case, the second judge (Andrews) specifically denied prejudice for or against either party,

and the defense failed to demonstrate otherwise.

Petitioner's primary motive for presenting this claim appears to be to have this Court review the evidence pertaining to his claim. This is contrary to the Court's holding in *United States v. Johnson*, 268 U.S. 220 (1925).

Respondent would submit that Petitioner's claim fails to present a substantial federal question, which would justify review by the Court. The question presented is not novel to the Court. Respondent would, therefore, urge that the question presented is so insubstantial as not to need further argument. *Del Poso v. Wilson*, 269 U.S. 82 (1925).

II.

WHETHER THE TRIAL COURT PROPERLY ADMITTED WARRANTLESS TAPE RECORDINGS OF TELEPHONE CONVERSATIONS BETWEEN PETITIONER AND THE GOVERNMENT'S KEY WITNESS?

Petitioner alleges that his Fourth Amendment Rights were violated because warrantless electronic recordation of his telephone conversations were introduced into evidence. Petitioner's allegation is totally without foundation.

In *Lopez v. United States*, 373 U.S. 427 (1963), the Court upheld a government agent's warrantless and unconsented recordation of his conversation with a bribery suspect, holding that the risk that Petitioner took in offering a bribe to an agent

fairly included the risk that the offer would be accurately reproduced in court, whether by faultless memory or mechanical recording.

Where one party to a telephone conversation consents to the taping of that conversation, the Fourth Amendment to the United States Constitution is not compromised. *United States v. White*, 401 U.S. 745 (1971).

In *United States v. White, supra*, the Court again noted that:

> ". . . one contemplating illegal activities must realize and risk that his companion may be reporting to the police. If he sufficiently doubts their trustworthiness, the association will very probably end or never materialize. But if he has no doubts or allays them, or risks what doubt he has, the risk is his. . . ."
>
> (401 U.S. 752)

See *Lewis v. United States*, 385 U.S.

206 (1966) and *Hoffa v. United States*, 385 U.S. 293 (1966).

Furthermore, Fed. R. Crim. P. 18 USC 2511(2)(c) specifically provides that a person acting under color of law may intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to the interception.

In the instant case, Judge Fogle gave his consent to the recordings of his conversations, and testified to this consent at trial. The circumstances in the present case do not support Petitioner's contention that his Fourth Amendment Rights were violated. No constitutional deprivation exists.

III.

WHETHER PETITIONER WAS DENIED HIS RIGHT TO DUE PROCESS OF LAW BY THE TRIAL COURT'S REFUSAL TO EXCUSE A JUROR?

Petitioner contends that he was denied due process of law because the trial judge refused to excuse juror Mercer. Petitioner's contention is utter nonsense.

While the constitutional standard of fairness requires that a defendant have a panel of impartial, "indifferent jurors," qualified jurors need not be totally ignorant of the facts and issues involved. *Irvin v. Dowd*, 366 U.S. 717 (1961)

As this Court observed:

> " . . .In these days of swift, widespread and diverse methods of communication, an important

case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. . ."

Id. at 723, 6 L.Ed. 2d 751, 81 S.Ct. 1639.

In *Reynolds v. United States*, 98 U.S. 145, (1878), the Court held that the burden is upon the Petitioner to demonstrate the existence of actual prejudice in the mind of the juror that would raise a presumption of partiality. Otherwise, the juror need not be set aside. *Reynolds, supra.*

In the instant case, the trial court was satisfied that juror Mercer could put aside any possible prejudice and decide the case on the evidence. This conclusion is supported by the following circumstances:

1) Juror Mercer was a college graduate with a degree in engineering giving rise to the inference that he was capable of dealing with abstract concepts.

2) Mr. Mercer was not sure that he had formed an opinion based on the news accounts, but in fairness admitted that he might have been prejudiced against the defendant. Mercer was initially certain that he could reach a verdict from the evidence alone.

3) Mr. Mercer did not take anything he read in the newspaper

personally and he could not remember anything specific in the news accounts which generated his possible prejudice.

4) Juror Mercer remained convinced that he could return a verdict based solely on the evidence and that he was not currently prejudiced against the defendant.

The voir dire in this case indicates no hostility to Petitioner by the jurors who served in his trial, as to suggest a partiality that could not be laid aside. *Murphy v. Florida*, 421 U.S. 794 (1975). Petitioner has failed to sustain his burden of demonstrating actual prejudice. The circumstances of this case do not support the conclusion that the trial court abused its discretion. No constitutional deprivation exists.

CONCLUSION

WHEREFORE, based upon the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

MICHAEL J. KOTLER
Assistant Attorney General

CHARLES CORCES, JR.
Assistant Attorney General
Park Trammell Building
1313 Tampa Street
Suite 804
Tampa, Florida 33602

Counsel for Respondent

CERTIFICATE OF SERVICE

I, CHARLES CORCES, JR., Counsel for Respondent, and a member of the Bar of the United States Supreme Court, hereby certify that on 6th

day of November, 1979, I served three copies of the Response and Appendix to the Petition for Writ of Certiorari on Roger E. Zuckerman, Esquire, Zuckerman, Spaeder & Taylor, 1800 M Street, N.W., Suite 375 North, Washington, D.C. 20036, by a duly addressed envelope with postage prepaid.

Charles Cooper

APPENDIX

APPENDIX

VII. DISQUALIFICATION AND SUBSTITUTION OF JUDGE

Rule 3.230. Disqualification of Judge

(a) The State or the defendant may move to disqualify the judge assigned to try the cause on the grounds: that the judge is prejudiced against the movant or in favor of the adverse party; that the defendant is related to the said judge by consanguinity or affinity within the third degree; or that said judge is related to an attorney or counselor of record for the defendant or the state by consanguinity or affinity within the third degree; or that said judge is a material witness for or against one of the parties to said cause.

(b) Every motion to disqualify shall be in writing and be accompanied by two or more affidavits setting forth facts relied upon to show the grounds for disqualification, and a certificate of counsel of record that the motion is made in good faith.

(c) A motion to disqualify a judge shall be filed no less than 10 days before the time the case is called for trial unless good cause is shown for failure to so file within such time.

(d) The judge presiding shall examine the motion and supporting affidavits to disqualify him for prejudice to determine their legal sufficiency only, but shall not pass on the truth of the facts alleged nor adjudicate the question of disqualification. If the motion and affidavits are legally sufficient, the presiding judge shall enter an order disqualifying himself and proceed no further therein. Another judge shall be designated in a manner prescribed by applicable law or rules for the substitution of judges for the trial of causes where the judge presiding is disqualified.

(e) When the prosecuting attorney or defendant shall have suggested the disqualification of a trial judge and an order shall have been made admitting the disqualification of such judge, and another judge shall have been assigned to act in lieu of the judge so held to be disqualified the judge so assigned shall not be disqualified on account of alleged prejudice against the party making the motion in the first instance, or in favor of the adverse party, unless such judge shall admit and hold that it is then a fact that he, the said judge, does not stand fair and impartial between the parties and if such judge shall hold, rule and adjudge that he does stand fair and impartial as between the parties and their respective interest, he shall cause such ruling to be entered

on the minutes of the court. The ruling of such judge may be reviewed by the appellate court, as are other rulings of the trial court.